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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1962

NO. 169

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a corporation

Petitioner

v.

STATE OF ALABAMA ex rel. RICHMOND M. FLOWERS
Attorney General of the State of Alabama

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE STATE OF ALABAMA IN OPPOSITION

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In the

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October Term, 1962

NO. 1141

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a corporation
Petitioner

v.

STATE OF ALABAMA ex rel. RICHMOND M. FLOWERS
Attorney General of the State of Alabama
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE STATE OF ALABAMA IN OPPOSITION

STATEMENT OF THE CASE

On June 1, 1956, the State of Alabama, on the relation of the Attorney General of the State of Alabama, filed a suit against the National Association for the Advancement of Colored People, a New York Corporation, in the Circuit Court of Montgomery County, Alabama, in Equity.

The suit prayed for a temporary and permanent injunction restraining the said corporation from doing intrastate business in the State of Alabama and for an order on final hearing ousting petitioner corporation from organizing or controlling any chapters of petitioner in Alabama and from exercising any of its corporate functions in the State of Alabama.

The temporary injunction was granted, and during its pendency, certain contempt proceedings were instituted against petitioner, not pertinent here except for historical

purposes. The litigation with reference thereto may be found in 265 Ala. 356; 268 Ala. 531; 268 Ala. 504; 271 Ala. 33, 122 So.2d 396; 353 U.S. 972; 357 U.S. 449; and 360 U.S. 240.

BASIS FOR SUIT

For many years pertitioner has been doing business in the State of Alabama as a foreign corporation without complying with the Constitution and laws of this State as set forth in Sections 192, 193, and 194 of Title 10, Code of Alabama 1940, and Article 12, Section 232, Constitution of Alabama 1901.

It was alleged that it has been engaging in business and activities not permitted by its Charter or Articles of Incorporation; has furnished money, moral and legal support of an illegal boycott; has criticized and maligned the courts of this State; has falsely charged criminal collusion against the trustees and officers of the University of Alabama; has ignored the orders of the State courts; and generally has pursued a course of conduct in Alabama, which necessitated its ouster.

FEDERAL COURT SUIT

A suit was filed by petitioner in the Federal District Court, Montgomery, Alabama, seeking to have that court adjudicate the merits of this present action and to restrain the State Circuit Court from further proceeding with it. It was claimed that state courts would not grant a hearing on the merits. This relief was denied, but the State Court in effect was ordered by this Court to try the merits of the action and the motion to dissolve the temporary injunction by January 2, 1962. The memorandum opinion of the Supreme Court of the United States is reported in 7

L.Ed.2d, No. 1 Advance Sheet, page 85, 30 L.W. 3130, and is as follows:

> "October 23, 1961. Per Curiam: The Petition for Writ of Certiorari is granted. The judgment below is vacated, and the case is remanded to the Court of Appeals with instructions to direct the District Court to proceed with the trial of the issues in this action unless within a reasonable time, no later than January 2, 1962, the State of Alabama shall have accorded to petitioner an opportunity to be heard on its motion to dissolve the state restraining order of June 1, 1956, and upon the merits of the action in which such order was issued. Pending the final determination of all proceedings in the state action, the District Court is authorized to retain jurisdiction over the federal action and to take such steps as may appear necessary and appropriate to assure a prompt disposition of all issues involved in, or connected with, the state action. Truax v. Corrigan, 257 US 312, 331-334, 66 L.ed 254, 262, 263, 42 S.Ct. 124, 27 ALR 375.
>
> "Mr. Justice Stewart took no part in the consideration or decision of this case."

Starting on December 27, 1961, and ending December 29, 1961, the said Circuit Court did try the issues directed to be tried by the Supreme Court of the United States, and on final hearing dissolved the temporary injunction, but issued a permanent injunction against petitioner, its agents, servants, etc., enjoining and restraining them from conducting intrastate business and activities of any kind and ousting petitioner from the State of Alabama. The decree of the court was entered on December 29, 1961. Petitioner appealed from this decree to the Supreme Court of Alabama.

THE APPEAL TO THE SUPREME COURT OF ALABAMA

The appeal was taken January 22, 1962. The case was briefed and argued orally before the Supreme Court of Alabama on December 18, 1962.

On February 28, 1963, the Supreme Court of Alabama affirmed the judgment of the Circuit Court of Montgomery County, Alabama, rendered December 29, 1961. .....Ala.....,, 150 So.2d 677.

The appeal required an affirmance of the decree of the lower court without a consideration of the merits of the case.

Petitioner's brief in the "Argument" section did not comply with Supreme Court Rule 9 of the Alabama Supreme Court. Title 7, Appendix, page 1159, Code of Alabama Recompiled 1958.

Said Rule 9 is as follows:

> "Appellant's brief under separate headings shall contain: (a) under the heading "Statement of the Case," a concise statement of so much of the record as fully presents every error and exception relied upon referring to the pages of the transcript; (b) under the heading "Statement of the Facts," a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely, referring to the pages of the transcript, and if the insufficiency of the evidence to sustain the verdict or finding, in fact or law, is assigned, then the statement shall contain a condensed recital of the evidence given by each witness in narrative form bearing on the points in issue so as to fully present the substance of the testimony of the witness

clearly and concisely; (c) under the heading "Propositions of Law," a concise statement, without argument, of each rule or proposition of law relied upon to sustain the errors assigned, together with the authorities relied upon in support of each, and in citing cases, the names of parties must be given, with the book and page where reported; (d) arguments with respect to errors assigned which counsel desire to insist upon. Assignments of error not substantially argued in brief will be deemed waived and will not be considered by the court. The statements made by appellant under the headings "Statement of the Case" and "Statement of the Facts" will be taken to be accurate and sufficient for decision, unless the opposite party in his brief shall make the necessary corrections or additions."

The Supreme Court of Alabama also has a rule of long standing and frequent application that where unrelated assignments of error are argued together and one is without merit, the others will not be considered.

QUESTION PRESENTED

Is a Federal question presented to this Court where a lower court decree is affirmed by a state supreme court, without reaching the merits, by reason of failure of petitioner to comply with that court's reasonable rules and practices in the preparation of its brief?

ARGUMENT

The District Court was ordered by this Court to proceed with the trial of the issues in this action unless within a reasonable time, no later than January 2, 1962, the State

of Alabama shall have accorded to petitioner an opportunity to be heard on its motion to dissolve the State restraining order of June 1, 1956, and upon the merits of the action in which such order was issued.

The above order has been fully complied with by the State of Alabama. A trial on the merits was given in the lower State court and a reasonable opportunity afforded petitioner to present its alleged rights in the Supreme Court of Alabama.

It is through petitioner's own fault that the rules and practices of the Supreme Court of Alabama have not been complied with.

There has been no unreasonable application of the practice and procedure of the Supreme Court of Alabama, and no Federal question is now presented over which this Court has jurisdiction. *Davis v. Wechsler*, 263 U.S. 22, 24; *Washington v. Miller*, 235 U.S. 422; *Michel v. Louisiana*, 350 U.S. 91; *Central Union v. Edwardsville*, 269 U.S. 190; *Parker v. People of State of Illinois*, 333 U.S. 571; *Hiawassee River Power Co. v. Carolina Tennessee Power Co.*, 252 U.S. 341.

Federal courts have rules similar to said Rule 9, and failure to comply warrants either dismissal or affirmance of an appeal. *Butler v. United States*, 108 Fed.2d 27; *Fleming v. Musingwear*, 162 Fed.2d 125; *Matheuson et al. v. First Trust Co. of St. Joseph, Mo.*, 100 Fed.2d 121, cert. den. 306 U.S. 633; *American Ins. Co. v. Scheufler*, 129 Fed.2d 143, cert. den. 317 U.S. 687; *The Catherine v. The United States*, 11 U.S. 99; *Portland Co. v. United States*, 82 U.S. 1.

In *Portland* this Court dismissed an appeal for counsel's failure to follow the 21st rule of the Court in making up his brief. The 21st rule is much like Rule 9 here involved.

It may be in order to point out here that the questions and issues involved in the court below made necessary the determination of state matters only. Whether or not a foreign corporation is doing business in a state contrary to state constitutional and statutory law is a state court matter and does not involve a Federal question. *Erie R. Co. v. Thompkins*, 304 U.S. 64; *State ex rel Griffith v. Knights of Ku Klux Klan*, 117 Kan. 564, 232 P. 254. This latter case was dismissed on appeal by this Court for want of a Federal question. 47 S.Ct. 458, 71 L.Ed. 829.

Petitioner has had full opportunity to be heard in the courts of Alabama and now presents nothing of a Federal nature for review. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287; *Market Street R. Co. v. Railroad Comm. of California*, 324 U.S. 548.

The mere averment of a constitutional question will not suffice unless in reality there is one presented. *O'Callaghan v. O'Brien*, 199 U.S. 89; *Norton v. Whiteside*, 239 U.S. 144.

The petition for writ of certiorari should be denied.

Respectfully submitted.

Richmond M. Flowers
Attorney General
State of Alabama

Gordon Madison
Assistant Attorney General
State of Alabama
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Gordon Madison, as Assistant Attorney General of the State of Alabama, one of the attorneys for the respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of June, 1963, I served a copy of the foregoing Brief in Opposition to the Petition for Writ of Certiorari on Robert L. Carter, Esq., 20 West 40th Street, New York 18, New York; Maria L. Marcus, 20 West 40th Street, New York 18, New York; Fred D. Gray, Esq., 34 North Perry Street, Montgomery, Alabama, Arthur D. Shores, Esq., 1527 Fifth Ave. North, Birmingham, Alabama, attorneys of record for petitioner, by mailing copies in duly addressed envelopes with first-class postage prepaid, and airmail where required.

Gordon Madison
Assistant Attorney General
State of Alabama